79-328

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1979

RAFAEL GOMEZ-MARTINEZ, Petitioner

vs.

IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DAVID T. LOPEZ
David T. Lopez & Assoc.
Counsel for Petitioner

3935 Westheimer
Suite 202
Houston, Texas 77027
(713) 965-9240

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IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

RAFAEL GOMEZ-MARTINEZ, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals entered in the above entitled case on April 11, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 593 F.2d 10 and is printed in Appendix A hereto, infra, p. A-1. The judgment of the United States Court of Appeals is printed in Appendix A hereto, infra, p. A-2. The opinion and order of the Board of Immigration Appeals is printed in Appendix A hereto, infra, p. A-5.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A , infra, p.A2) was entered on April 11, 1979. A timely petition for rehearing was denied on June 14, 1979 (Appendix A, infra, p. A-4). The jurisdiction of the Supreme Court in invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Should the holding in Jay vs. Boyd, 351 U.S. 345 (1956) be harmonized with the holdings in Costello vs. Immigration & Naturalization Service, 376 U.S. 120 (1964), and prior decisions, to require that upon a showing of long residence in the United States and good moral character, doubts as to whether other evidence presented establishes "extreme hardship" should be resolved in favor of an applicant for suspension of deportation?

2. Is the requirement of the Immigration & Naturalization Service that an applicant for suspension of deportation who relies in part on economic hardship also show "substantial equities" arbitrary, since it is neither supported by statute or regulation, nor does it inform the applicant fairly of his burden of

persuasion?

3. Are applicants for suspension of deportation deprived of procedural due process rights under the Fifth Amendment by the failure of the Immigration & Naturalization Service to clarify by implementing regulations the inherent ambiguities of the applicable statute and by the failure to sufficiently specify in its decisions the conditions upon which administrative discretion will be exercised?

4. Was the Petitioner deprived of procedural due process by the failure of the Immigration & Naturalization Service and the reviewing Court to consider and comment on all the evidence presented in support of his application?

5. Was the Petitioner deprived of procedural due process by the withdrawal by the Immigration & Naturalization Service of the privilege of voluntary

departure as punishment for having sought judicial review?

STATUTE INVOLVED

The statute involved is Sub-sections (a)(1) and (e) of §244 of the Immigration & Naturalization Act, codified as 8 U.S.C. §1254(a)(1) and (e). The pertinent text of the statute is printed in Appendix B hereto, infra.

STATEMENT OF CASE

Petitioner, a national of Mexico, overstayed after a lawful entry to the United States and has lived in this country continuously for about 13 years.

In 1974, officials at one of his children's school requested information regarding the child's immigration status. Unable to resolve the problem with school authorities, Petitioner took his child to

the Houston District Office of the Immigration & Naturalization Service, where he was arrested and made the subject of deportation proceedings.

Seeking to avoid the harsh consequences of deportation on himself, his wife, and their three children, Petitioner applied for suspension of deportation, demonstrating the requisite 7-year continuous residence and good moral character requirements.

The Immigration Judge, however, turned down his application on the basis that the Petitioner's asserted economic hardship was not sufficient to warrant consideration of the discretionary administrative relief requested. The Immigration Judge, however, did not consider other grounds of asserted hardship, and these additional grounds were not given any consideration by the Board of Immigration

Appeals and by the United States Court of Appeals for the Fifth Circuit.

Although the Board of Immigration Appeals permitted the Petitioner voluntary departure after rejecting his appeal, the United States Court of Appeals for the Fifth Circuit did not rule on this issue, and immediately upon the rendering of judgment by the Appeals Court, the Immigration & Naturalization Service sought to deport the Petitioner. Deportation, unlike voluntary departure at Petitioner's own expense, would require that the Petitioner obtain prior approval from the Immigration & Naturalization Service before being able to apply for an immigrant visa.

REASONS FOR GRANTING WRIT

This Court should grant the Writ of Certiorari to resolve important questions regarding the exercise of discretion by

the Immigration & Naturalization Service, in behalf of the Attorney General, to grant or deny suspension of deportation.

At present, there are no clear standards either in the statute, in implementing regulations, or in judicial determinations. Decisions on the issue by this Court appear to be in substantial conflict.

Thus, this Court has held that when dealing with the question of deportation, all doubts regarding statutory construction should be resolved in favor of the alien, Costello vs. Immigration & Naturalization Service, 376 U.S. 120 (1964). But in relation to suspension of deportation, the Court has granted unfettered discretion to the Immigration & Naturalization Service to interpret the statute against the alien, Jay vs. Boyd, 351 U.S. 345 (1956).

The rights of the alien involved are

of supreme importance. Deportation is a drastic measure which has been considered by this Court the equivalent of banishment or exile, Delgadillo vs. Carmichael, 332 U.S. 388 (1947). Forfeiture of a residence in this country is a penalty generally reserved for serious misconduct, Fong Haw Tan vs. Phelan, 333 U.S. 6 (1948).

The salutary purposes of the statute involved are clearly reflected in the congressional history and are inconsistent with deportation of an alien of good moral character who has resided for a long time in this country on an overly strict and technical interpretation of the law, see Mrvica vs. Esperdy, 376 U.S. 560 (1964) (Dissenting opinion of Justice Goldberg.).

Because, as may be expected, Petitioner directed the attention of the Immigration & Naturalization Service to the serious economic impact deportation would

have on him and his family, the Immigration & Naturalization Service has limited its consideration to that issue, and such limited consideration has been sanctioned on review.

Applicants for suspension of deportation are faced with the unconscionable burden of persuading the Immigration Judge on an issue which has not been defined. The regulations pertaining to suspension of deportation, 8 C.F.R. Part 244, do not specify how a determination on the issue will be made. Compare, in contrast, 8 C.F.R. §242.18(a), which requires the Immigration Judge to discuss the evidence and his findings regarding deportability.

While Petitioner and others similarly situated are precluded from knowing exactly what they must show the Immigration Judge to obtain consideration of their applications for deportation,

judicial review is discouraged by the withdrawal of the privilege of voluntary departure to those persons who seek review of a decision by the Board of Immigration Appeals.

While conceding that the statute gives the Attorney General discretion on the issue, Petitioner respectfully submits that a consideration of the purpose of the statute, and of the rights to due process secured by the Fifth Amendment to the United States Constitution, require that such discretion be exercised in a uniform, rational, and fair form.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DAVID T. LOPEZ
Counsel for Petitioner
3935 Westheimer-Ste. 202
Houston, Texas 77027
(713) 965-9240

DATED this 28th day of August, 1979.

OF COUNSEL:

DAVID T. LOPEZ & ASSOC.

APPENDIX A

OPINIONS BELOW

Rafael GOMEZ-MARTINEZ,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 78-3170
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

April 11, 1979.

Petition was filed for review of an order of the Immigration and Naturalization Service. The Court of Appeals held that petitioner failed to discharge his burden of establishing "extreme hardship" required for suspension of deportation.

Dismissed.

Aliens ⇐54.1(4)

Petitioner failed to discharge his burden of establishing "extreme hardship" required for suspension of deportation. Immigration and Nationality Act, § 244(a)(1, 2), 8 U.S.C.A. § 1254(a)(1, 2).

Petition for Review of an Order of the Immigration and Naturalization Service.

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM.

Petitioner is unquestionably deportable under the provisions of 8 U.S.C. 1251(a)(2) but seeks to avoid the rigors of such deportation by claiming that he is entitled to the suspension of deportation under 8 U.S.C. 1254(a)(2). The immigration judge found petitioner deportable and denied his application for suspension of deportation but granted him the privilege of voluntary departure. The Board of Immigration Appeals dismissed petitioners appeal from the immigration judge's decision and reinstated the privilege of voluntary departure.

We have before us a petition of review. After an examination of the record, and the briefs of petitioner and respondent, we are of the opinion that the petitioner has not discharged his burden of establishing the "extreme hardship" required by § 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). The decisions under review should be affirmed and the petition for review dismissed.

DISMISSED.

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1978

No. 78-3170
Summary Calendar

RAFAEL GOMEZ-MARTINEZ,
Petitioner

versus

IMMIGRATION & NATURALIZATION SERVICE,
Respondent

Petition for Review of an Order of the
Immigration and Naturalization Service

Before GOLDBERG, RONEY and TJOFLAT,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the Immigration and Naturalization Service, and was taken under submission by the court upon the records and briefs on file pursuant to Rule 18:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the petition for review of an order of the Immigration and Naturalization Service in this cause be, and the same is hereby dismissed; and the order of the Immigration and Naturalization Service is hereby, affirmed.

It is further ordered that petitioner pay to respondent, the costs on appeal to be taxed by the Clerk of this Court.

April 11, 1979

Issued as Mandate: June 22, 1979.

No. 78-3170

RAFAEL GOMEZ-MARTINEZ,
Petitioner

versus

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

Petition for Review of an Order of the
Immigration and Naturalization Service

ON PETITION FOR REHEARING
(June 14, 1979)

Before GOLDBERG, RONEY and TJOFLAT,
Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

(Irving L. Goldberg)
United States Circuit Judge

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

WASHINGTON, D.C. 20530

August 31, 1978

File: A20 288 460 - Houston

In re: RAFAEL GOMEZ-MARTINEZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: David T. Lopez, Esq.
3935 Westheimer
Suite 202
Houston, Texas 77027

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2)) - Non-immigrant visitor - remained longer than permitted

APPLICATION: Suspension of deportation under section 244(a)(1), Immigration & Nationality Act

The record relates to the respondent, a 38-year-old married male alien, native and citizen of Mexico, who last entered the United States as a nonimmigrant visitor in 1973. He conceded deportability as an overstay. We find deportability has

been established by evidence that is clear, convincing and unequivocal.

In an order dated August 29, 1977, the immigration judge found the respondent deportable as charged, and denied his application for suspension of deportation. The respondent appeals from the denial of his application for suspension of deportation. The appeal will be dismissed.

On appeal the sole issue is whether the denial of suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1), was proper. The immigration judge denied the 244(a)(1) application on the ground that extreme hardship had not been established.

On the matter of the respondent's application for suspension of deportation, the immigration judge noted that the evidence of record does not clearly show that the respondent has been continuously physically present in the United States for not less than seven years as required by the statute. He did, however, assume arguendo, that the respondent was present during the last seven years. The immigration judge then found that there was no showing that the respondent is statutorily barred from establishing the good moral character requirement of the Act. However, the immigration judge concluded that difficulty in finding employment in Mexico and having to return to a country with a lower standard of living is not the "extreme hardship" within the meaning of section 244(a)(1) of the Act, citing Pelaez v. INS, 513 F.2d 503 (5 Cir. 1975).

We have carefully reviewed the record, including counsel's representations on appeal, and conclude in agreement with the immigration judge that the respondents have failed to sustain his burden of proof that he would suffer extreme hardship as alleged. Thus, he is ineligible for suspension of deportation under section 244 (a)(1) of the Act. Although the respondent's deportation may result in some economic detriment to him, we are persuaded that he would not suffer extreme hardship in the absence of other substantial equities, within the meaning of section 244(a)(1) of the Act, Matter of Sangster, 11 I&N Dec. 309 (BIA 1965). See: Fong Choi Yu v. INS, 439 F.2d 719 (9 Cir. 1971); Kasravi v. INS, 400 F.2d 675 (9 Cir. 1968). Additionally, as we have pointed out in numerous decisions, economic hardship cannot be equated with the "extreme hardship" which Congress has made an eligibility requirement under section 244(a)(1). The courts have upheld that interpretation of the statute for a very simple reason: If economic hardship were equated with extreme hardship, practically every deportable alien could claim eligibility for section 244(a)(1) relief in view of the wide difference in economic standards of living between the United States and other countries, Nishikage v. INS, 433 F.2d 904 (9 Cir. 1971).

For the foregoing reasons, we shall dismiss the appeal.

Because the term of voluntary departure granted the respondent by the immigration judge has expired, we shall grant the respondent 30 days in which to depart from the United States voluntarily or any

extension beyond such date as may be granted by the District Director and under such conditions as the District Director may direct. See Matter of Chouliaris, Interim Decision 2572 (BIA 1977).

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

Chairman

APPENDIX B

STATUTE INVOLVED

8 USC Sec. 1254

(a) Adjustment of status for permanent residence; contents. As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and--

> (1) is deportable under any law of the United States except the provision specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

***

(e) Voluntary Departure. The Attorney General may, in his discretion, permit any alien under deportation proceedings...to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

No. 79-328

In the Supreme Court of the United States

OCTOBER TERM, 1979

RAFAEL GOMEZ-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-328

RAFAEL GOMEZ-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that immigration authorities abused their discretion in denying his application for suspension of deportation under 8 U.S.C. 1254 on the ground that he failed to show that he would suffer "extreme hardship" as a result of deportation.

1. Petitioner is a native and citizen of Mexico who last entered the United States on December 27, 1973, as a nonimmigrant visitor authorized to remain until January 11, 1974. Petitioner remained in the United States beyond this authorized period.

On October 22, 1974, the District Director of the Immigration and Naturalization Service granted petitioner the privilege of voluntary departure until

November 21, 1974. Petitioner failed to depart within this time, however, and was served with an order to show cause why he should not be deported.

At the deportation hearing on January 6, 1975, petitioner conceded deportability (R. 48) but requested suspension of deportation pursuant to 8 U.S.C. 1254(a)(1). INS conducted an investigation and held another hearing on June 7, 1977. Evidence presented at this hearing revealed that petitioner was a welder earning $800 per month and that he felt he could obtain similar employment in Mexico (R. 36). When asked what hardship he would face if deported, petitioner replied that he would receive lower wages in Mexico and that his children had become accustomed to the United States (R. 37).

Based on this evidence, the immigration judge denied petitioner's application for suspension of deportation, concluding that petitioner had failed to meet the burden of showing extreme hardship as required under 8 U.S.C. 1254(a)(1) (R. 21c-23).[1] The immigration judge stated (R. 22) (citations omitted):

> While respondent has become accustomed to the American way of life, the difference between the economic standards in the United States and other countries cannot be held to command the favorable exercise of discretion.
>
> Difficulty in finding employment and having to return to a country with a lower standard of living is not extreme hardship within the meaning of [8 U.S.C. 1254(a)(1)].

[1]The immigration judge further found that petitioner filed no income tax return for 1970 and 1971, that he never filed an address report with INS, and that he never received INS permission to be gainfully employed (R. 21c).

The Board of Immigration Appeals dismissed petitioner's appeal on identical grounds (Pet. App. A-5 to A-8). The court of appeals dismissed a petition for review (*id.* at A-1).

2. Petitioner's contention that he was improperly denied suspension of deportation is not well-founded. Suspension of deportation under 8 U.S.C. 1254(a)(1) is an act of administrative grace and rests in the discretion of the Attorney General and those to whom he has delegated this authority. *Kimm* v. *Rosenberg*, 363 U.S. 405 (1960); *Jay* v. *Boyd*, 351 U.S. 345 (1956). Cf. *INS* v. *Bagamasbad*, 429 U.S. 24 (1976). Whatever the limits of that discretion, it was not abused here.

As the record clearly indicates, petitioner's only proof of extreme hardship was a fear of decreased earnings and a general desire to stay in the United States (R. 37).[2] A mere showing that one will receive lower wages or less desirable employment in another country does not meet the standard of "extreme hardship" under the statute. *Davidson* v. *INS*, 558 F. 2d 1361 (9th Cir. 1977); *Pelaez* v. *INS*, 513 F. 2d 303, 305 (5th Cir. 1975); *Kam Ng* v. *Pilliod*, 279 F. 2d 207, 210 (7th Cir. 1960) cert. denied, 365 U.S. 860 (1961).[3] While petitioner asserts that the

[2]Petitioner also testified that his children had "gotten used to living here" (R. 37). But petitioner's children are also deportable aliens (R. 21a-21b, 23), so their desire to stay is of no more significance than his own. Cf. *Urbano de Malaluan* v. *INS*, 577 F. 2d 589, 594-595 (9th Cir. 1978).

[3]The rule that an alien seeking suspension of deportation must show more than economic hardship is not arbitrary, as petitioner suggests (Pet. 3-4). Most persons would earn less money outside of the United States. Thus, as the Board of Immigration Appeals recognized, if this alone were sufficient to prove extreme hardship, almost every deportable alien would qualify for relief (Pet. App. A-7).

immigration judge and the Board of Immigration Appeals failed to consider other evidence of hardship in petitioner's favor (Pet. 7), he fails to reveal the nature of that evidence or its effect on the determination of extreme hardship.

Nor is petitioner correct in contending that the refusal to grant suspension in this case conflicts with *Costello* v. *INS*, 376 U.S. 120 (1964), which, he argues (Pet. 8), requires that doubts about whether an alien would suffer "extreme hardship" through deportation must be resolved in favor of the alien. In *Costello*, the Court held that in determining deportability under Section 241 of the Immigration and Nationality Act of 1952, statutory ambiguities should be resolved in favor of the alien. In the present case, however, there is no question of deportability because petitioner has conceded it (R. 26).[4]

---

[4]The immigration judge granted petitioner the privilege of voluntary departure until October 29, 1977 (R. 23) and the Board of Immigration Appeals reinstated that privilege for 30 days following its decision (R. 3). Petitioner claims (Pet. 4-5, 7) that INS, in seeking to deport petitioner beyond this period, withdrew its grant of voluntary departure as punishment for taking an appeal to the Fifth Circuit. This claim is without support in the record. INS made no attempt to deport petitioner until his privilege lapsed. Furthermore, the court of appeals stayed its mandate until August 31, 1979, in order to allow petitioner further review. Therefore, petitioner has been permitted to stay in this country well beyond the 30 days originally granted him.

Finally, petitioner asserts (Pet. 4, 10) that the Attorney General's failure to promulgate rules precisely defining when his discretion to suspend deportation will be exercised is a violation of due process. Any such rules would be virtually impossible to promulgate in light of the broad discretion granted the Attorney General and the multitude of circumstances in which it might apply. In any event, the case law should have made it clear to petitioner that his showing of economic hardship would be inadequate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

DOJ-1979-10